

- (1) Whether the Administrative Law Judge erred in finding claimant permanently totally disabled as a result of injuries suffered with Asbury Hospital Association.
- (2) Whether claimant suffered an aggravation to her condition in a separate accident on or about November 13, 1988 while employed with Holiday Inn, Inc.
- (3) Whether the Administrative Law Judge failed to properly apply the work disability rule set forth in Ploutz v. Ell-Kan Co., 234 Kan. 953, 676 P.2d 753 (1984), in rendering his decision.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, and in addition the stipulations of the parties, the Appeals Board makes the following findings of fact and conclusions of law:

Claimant originally suffered injury to her back while working for Asbury Hospital in January 1985. After lengthy litigation, claimant was awarded a sixty percent (60%) permanent partial work disability under Ploutz, supra, by Award of September 28, 1987. This case is presented to the Appeals Board after claimant filed for review and modification under K.S.A. 44-528 from the original Award. In a companion case, Docket No. 133,792 not appealed to the Appeals Board, claimant alleged separate injury to her back while working for Holiday Inn on November 13 and 14, 1988. Claimant was awarded a permanent total disability as a result of the injury suffered at Asbury Hospital under the filed review and modification; and awarded temporary benefits only as a result of her employment with Holiday Inn. The finding in Docket No. 133,792 wherein claimant was awarded only temporary benefits as a result of her employment at Holiday Inn has not been appealed to this Board and said finding is final.

After suffering the original injury to her low back while working for Asbury Hospital, the claimant underwent vocational retraining in food service and obtained a job with Holiday Inn in 1988. Her job at Holiday Inn consisted of assisting in the preparation of vegetables for the salad bar.

Mr. Bill Fekas, the chef at the Holiday Inn, interviewed claimant when she applied for the job. He was advised of claimant's prior injuries and limitations and agreed when she was hired that she would not be required to do any heavy lifting. She would be required to stand or sit and prepare the ingredients for the salad bar. He observed claimant working during the two days in question and recalls no specific incident of injury. He further recalls no report by claimant of any increased symptoms of back problems while employed with Holiday Inn.

Claimant testified that by the end of her first day at Holiday Inn she was sore and achy, but by the end of the second day, her back was getting stiff. When she awoke the morning of the third day, her back and legs were hurting severely. She contacted Dr. Milo G. Sloo, her arthritis treating physician, for the purpose of scheduling an appointment.

Dr. Sloo, a board-certified orthopedic surgeon, first began treating claimant in February 1986, when he took over for Dr. Roy Coffey who had retired. He diagnosed

stenosis at the L4-5 level, indicating degenerative spurring into claimant's spinal canal. He felt claimant had a chronic lumbosacral sprain syndrome with mild, spontaneous exacerbations. Claimant suffered radiculopathy down to the left knee. Claimant did show signs of improvement when Dr. Sloo examined her in July 1987. This was shortly after a brief employment experience with Presbyterian Manor.

When Dr. Sloo examined claimant in November 1988, she had recurrent pain in the left hip and leg and a positive straight leg raise. In August 1986, Dr. Sloo had recommended claimant not work at a job which required continuous standing in one position. He felt this restriction was permanent. After having been described the claimant's working conditions at Holiday Inn, he felt the job aggravated her pre-existing condition. He increased her functional impairment from ten percent (10%) in 1986 to fifteen percent (15%) in 1988. He did testify that claimant's objective testing and CT scans had not changed but that he increased her functional impairment as a result of the increased symptomatology into her legs. The additional five percent (5%) was due to the subjective complaints of increased pain in the left leg. He did feel that the employment work at Holiday Inn was within the restrictions that he had set. When asked if he felt claimant's increased symptomatology was a reasonable and natural consequence of her earlier problems, he opined he had no way of saying one way or the other.

Dr. Sloo felt claimant's ongoing complaints of low back pain and her inability to perform the two brief jobs after leaving Asbury were consistent with a chronic lumbosacral sprain. He went on to testify that the longer a person remains inactive after a lumbar sprain or strain, the less likely they will ever return to any type of productive employment. He felt claimant's degenerative disc disease diagnosed in 1986 was a progressive condition, which occasionally provides positive straight leg findings. He agreed that degenerative disc disease in the lower spine could progress and cause positive straight findings with or without claimant's involvement at the Holiday Inn, but felt the Holiday Inn situation had aggravated her condition permanently. It should be noted claimant's employment at the Holiday Inn lasted two (2) days, while her employment at Asbury Hospital lasted over ten (10) years.

Claimant was examined on two occasions by Dr. Edward J. Prostic, a board-certified orthopedic surgeon. The first examination occurred on March 9, 1987, with the final examination occurring September 15, 1992.

When asked to differentiate between the two examinations, Dr. Prostic opined that claimant had less flexibility the second time around and was more limited in extension and lateral bend. The leg pain experienced by claimant in September 1992, extended farther down into her left calf. He did indicate that this was significant clinically. He felt that the activities at Holiday Inn did increase her pain, but that these activities would not normally cause a back injury. He rated her at fifteen percent (15%) functional impairment in 1986 and increased this to twenty percent (20%) in 1992. The increased rating stemmed from the fact that he thought originally she would improve. The continued symptoms in 1992 indicated that she would not improve. He also opined that the increased impairment was more a natural progression of the degenerative disc disease, rather than a distinct new injury at the Holiday Inn job. He saw the prolonged standing experienced by the claimant at the Holiday Inn as a temporary aggravation only. When he last examined the claimant in September 1992, he felt she was totally disabled. He was asked whether he felt claimant was capable of returning to substantial, gainful employment and he stated that,

". . . at the present time . . .," he did not believe claimant able to return to substantial, gainful employment.

He went on to state that the increased disability was, in his opinion, attributable to the natural and probable consequences of the work-related injury suffered at the Asbury Hospital.

Claimant was examined by Dr. Gregg Snyder, a board-certified neurosurgeon, on August 14, 1991. Dr. Snyder felt claimant had symptomatic degenerative disc disease with no evidence of nerve root compression. He felt claimant suffered normal wear and tear and opined her symptoms came solely from the natural aging process. He found no additional impairment to the claimant as a result of her work at the Holiday Inn, but was also of the opinion that she had no functional impairment as a result of her work at the Asbury Hospital.

The claimant, while testifying that she felt the Holiday Inn had permanently aggravated her condition, could not testify with specificity regarding what, if any, activities at the Holiday Inn caused her increased problems. She did indicate a gradual onset of pain during the two days of her employment with Holiday Inn, caused primarily from standing.

In proceedings under the Workers Compensation Act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation by proving the various conditions on which the claimant's right depends.

K.S.A. 44-508(g) defines burden of proof as follows:

"'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

The burden of proof is upon the claimant to establish his right for an award for compensation by proving all the various conditions on which his right to a recovery depends. This must be established by a preponderance of the credible evidence. Box v. Cessna Aircraft Co., 236 Kan. 237, 689 P.2d 871 (1984).

It is the function of the trier of facts to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. The trier of fact is not bound by medical evidence presented in the case and has a responsibility of making its own determination. Tovar v. IBP, Inc., 15 Kan. App. 2d 782, 817 P.2d 212, rev. denied 249 Kan. 778 (1991).

The Appeals Board as the trier of fact must decide which testimony is more accurate and/or credible. In reviewing the testimony of the medical experts deposed, the Appeals Board finds that the testimony of Dr. Prostic appears more credible and is more supported by the facts in the record. The Appeals Board must, however, disagree with the interpretation of Dr. Prostic's testimony as presented in the Award. Dr. Prostic found claimant to be temporarily totally disabled when he last saw her in September 1992. When asked if claimant was able to return to work he stated that at the present time he felt claimant unable to return to substantial, gainful employment. This opinion is a medical

certainty only as to the period of time in question. It does not state within a reasonable degree of medical probability that claimant is unable to return to substantial, gainful employment at any time in the future.

K.S.A. 44-510c(a)(b)(2) states:

"Temporary total disability exists when the employee, on account of the injury, has been rendered completely and temporarily incapable of engaging in any type of substantial and gainful employment."

The Appeals Board finds that claimant, as of September 15, 1992, is temporarily totally disabled and is entitled to benefits for same, based upon an average weekly wage of \$237.13, until she is found to have reached maximum medical improvement or is released to substantial and gainful employment or until further order of the Director. The Appeals Board further finds that this temporary total disability is a direct and natural consequence of her employment with Asbury Hospital.

The Appeals Board further finds that based upon the limitations set upon claimant by the evaluating and treating physicians, claimant is not at this time permanently and totally disabled. Any decision regarding the permanent total nature of claimant's disability must be made subsequent to reaching maximum medical improvement.

Claimant's request for review and modification under K.S.A. 44-528 is limited pursuant to K.S.A. 44-528(d) to no more than six (6) months prior to the date that the application was made for review and modification. As claimant's Application for Review and Modification was received in the Director's office April 16, 1991, the effective date of the modification is October 16, 1990.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge James R. Ward, dated April 15, 1994, should be, and hereby is, modified as follows:

AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Edna L. Davis, and against the respondent, Asbury Hospital Association, and its insurance carrier, Alexis, Inc., for an accidental injury which occurred January 14, 1985 and based upon an average weekly wage of \$237.14 for temporary total disability compensation at the rate of \$158.10 per week beginning October 16, 1990 and continuing until claimant has been paid a total of \$75,000 or until further order of the Director. As of March 17, 1995, the entire \$75,000 would be due and owing in one lump sum less any compensation previously paid by respondent, Asbury Hospital Association, and its insurance carrier, including all permanent partial and temporary total disability compensation payments made prior to October 16, 1990.

The Appeals Board further awards claimant future medical upon application to and approval by the Director.

All other orders of Administrative Law Judge James R. Ward, that are not in contravention of this Award, are hereby affirmed and remain in full force and effect from Docket No. 115,603.

Fees and expenses for the administration of the Kansas Workers Compensation Act are assessed against the respondent and its insurance carrier as delineated in the April 15, 1994 Award of Administrative Law Judge James R. Ward.

IT IS SO ORDERED.

Dated this ____ day of March, 1995.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Seth G. Valerius, Topeka, KS
John W. Mize, Topeka, KS
James R. Ward, Administrative Law Judge
George Gomez, Director